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State Records Committee Meeting

Division of Archives, Courtyard Meeting Room

February 15, 2012 Salt Lake City, Utah

Members Present:

Lex Hemphill, Media Representative

Scott Daniels, Citizen Representative Doug Misner, History Representative

Betsy Ross, Auditor's Office Representative Ernest Rowley, Elected Public Official

Patricia Smith-Mansfield, Governor's Designee Scott Whittaker, Private Records Manager

Legal Counsel:

Paul Tonks, Attorney General's Office Amanda Jex, Attorney General's Office

Executive Secretary:

Participating via

Susan Mumford, Utah State Archives

Telephone:

Wesley Thompson, petitioner

Others Attending

Matt Anderson, Attorney for respondent

Joshua Bullough, Archives staff Rosemary Cundiff, Archives staff

Bryce DeGiulio, Department of Corrections Judy Fahys, *Salt Lake Tribune*, petitioner Geoff Fattah, Community and Culture Mike Hansen, Community and Culture

Dan Harrie, Salt Lake Tribune

Katherine Kinsman, Attorney General's Office Jennifer Rigby Kohler, Attorney for UTA Greg Peay, Department of Corrections Gina Proctor, Department of Corrections

Ms. Betsy Ross called the meeting to order at 9:30 a.m. She contacted Mr. Thompson by phone. Ms. Ross welcomed the parties for the first hearing and explained the procedures.

Hearing - Wesley Thompson vs. Utah Department of Corrections

Opening statement, petitioner

Mr. Thompson had no opening statement. He said he would wait for his thirty-minute time period to address the Committee.

Opening statement -- respondent

Matt Anderson, attorney for the Department of Corrections, introduced himself. Mr. Thompson requested documents referred to as: CACL and CALH. They were the Correctional Adjustment Check List and the Correctional Adjustment Life History. They are

tools used by Corrections to assess the behavior of an individual inmate. The purpose of assessment was to determine how to safely house the inmate with other inmates. With over 4,000 inmates, there was a need for a streamlined system so that officers could determine housing and moves within the prison. UCA § 63G-2-305(12) offers protection of records that would jeopardize the safety and security of a correctional facility. The documents were worksheets relied on to safely house inmates. They contained subjective observations as well as a check list. Each observation had a point value. The total of the points equals a score and a classification resulting from the score for each inmate. Providing the documents would give inmates a window into the operations of the prison and how behaviors are weighted. An inmate could use the knowledge to circumvent the process and appear for a short period of time to be less threatening or aggressive than they truly were. This could enable them to be housed with someone they could victimize. This would jeopardize the safety and security of the prison, the individual inmate, and the corrections officers. He asked that the Committee sustain the classifications of the documents as protected.

Testimony – petitioner

Mr. Thompson said the documents he requested had classified him under the wrong classification. There are three classifications: Kappa, Sigma, and Omega. He had been classified as a Kappa, which put him in with the mainstream population. He felt he had been wrongly classified and needed to see the questions and the checklist to find where the mistakes had been made. Mr. Thompson ended his argument.

Testimony - respondent

Mr. Anderson said he had asked Deputy Warden Bryce DeGiulio from the Department of Corrections to explain the worksheets and the process of classification. Ms. Ross put the witness under oath. Deputy Warden De Giulio said he was employed with the Department of Corrections and had been employed there for twenty-four years. He was familiar with the requested documents. He said the CACL was a checklist used by the correctional officer to observe the behavior of inmates. While the inmate is in the receiving and orientation process, officers observe the inmate's behaviors. The other document, the CALH, is completed by a case worker. Each worksheet has a score. Combined, the worksheets provide an overall score to classify an inmate. A score range determines the category. The Kappas were the more aggressive and violent inmates. The Omegas were neither violent nor submissive. The Sigmas were the weaker or often preyed upon category. Most of the inmates at the prison were Kappas. There were very few Omegas and a few more Sigmas than Omegas, Sigmas could not be housed with a Kappa. Omegas could be housed with either a Sigma or a Kappa. The problem with releasing either of the documents would be that the inmates would have information that would enable them to manipulate their classification. They could be categorized as a weaker inmate and be able to prey upon other inmates. The safety of other inmates, officers, and the overall safety and security of the institution could be jeopardized. At the Draper prison there were over 3,700 inmates. Overall prison inmates in Utah totaled 6,000. The same classification system was used at the Central Utah Correctional facility (CUCF). If an inmate wanted to challenge a classification, a form was available. He could fill it out and discuss it with a case manager. The case manager and the captain of the housing unit would evaluate the classification and could change it if they felt it was done incorrectly. If the classification stayed the same, the process could be redone with a new evaluation by

different officers and case workers. A classification review officer could independently evaluate the inmate. Once a final score was achieved, the housing review committee would determine whether the score should be changed. An inmate could go directly to a classification review officer if he disagreed with the case worker's or the housing unit officer's assessment. The classification did not affect any privileges at the prison but was only used for housing purposes. Deputy Warden DeGiulio testified that Mr. Thompson's classification had gone through all levels of review and had been upheld. Mr. Thompson was classified as a Kappa.

Closing - petitioner

Mr. Thompson said he had spoken to several case workers trying to correct what he felt was a mistake in his classification. He had spoken to only one person interested in reclassifying him, an officer who had retired. He had not been able to work with his case worker on the issue and felt he needed to review the documents himself along with the case worker. He said he needed to see what questions and checkpoints had been made in observing him. He said his classification had been documented wrongly.

Closing - respondent

Mr. Anderson said the documents were the kind of documents the legislature intended to be protected under UCA § 63G-2-305(12). The reasoning was the same as not giving warning of a surprise search of an inmate's cell. The check lists were relied on to give officers a chance to observe and evaluate inmates without informing the inmates of subjective observations or the items on the checklist. Knowing the criteria could allow inmates to circumvent the process and change their behavior to fit a certain type. Allowing access to the documents could put vulnerable inmates at risk of being victimized. It could jeopardize the safety of officers charged with maintaining security and managing inmates. Mr. Anderson said he had brought the requested documents to the hearing for the Committee to review. He asked the Committee to sustain the department's classification of the documents as protected.

Deliberation

Ms. Smith-Mansfield made a motion to uphold the classification of the records under UCA 63G-2-305(10) and (12). Mr. Hemphill seconded the motion. A vote was taken. Mr. Daniels, Mr. Hemphill, Mr. Misner, Ms. Ross, Mr. Rowley, Ms. Smith-Mansfield, and Mr. Whittaker voted in favor of the motion. The motion passed unanimously. Ms. Ross said a written order would be sent to the parties within five days. She thanked the parties for their participation.

Hearing – Judy Fahys, Salt Lake Tribune vs. Utah Department of Community and Culture

Ms. Ross said that two members of the Committee were excused for the hearing. Mr. Misner and Ms. Smith-Mansfield recused themselves. The documents that had been reviewed in camera by each of the Committee members participating in the hearing were provided to the Committee for reference. Ms. Ross said the hearing was a continuation of a previous hearing. Since the last hearing, the Department of Community and Culture had provided a log and the denied records for the Committee to review in camera. Each member of the Committee participating in the hearing had reviewed the records. She said each of the parties could comment before the Committee's deliberation.

Petitioner

Mr. Dan Harrie represented the *Salt Lake Tribune*. Ms. Fahys was not available. He said the Tribune had asked the Committee to review the documents that had not been released to determine if they had been classified correctly.

Respondent

Ms. Kathy Kinsman represented the Department of Community and Culture. She said the department had released 5,400 documents in response to the Tribune's request. The department had worked with the *Tribune* for many months to get the request in a format so that a search could be conducted. There were sixty-nine documents in a log that had not been released. She said the Committee could determine if the documents had been classified correctly. The Committee discussed the numbering of the documents and the log that listed the documents. Ms. Ross said the availability of final documents for which the drafts were created was not regarded by the Department of Community and Culture as pertinent to the classification of drafts. Ms. Kinsman said the provision of final documents was not required by GRAMA. Mr. Daniels asked about the names of people mentioned in the documents. Mike Hansen, Deputy Director of the Department of Community and Culture, was sworn as a witness. He identified Dr. David Madsen as a former state Archeologist, an academic, interested in the state's archeology program. Ally Isom was the deputy chief of staff in the Governor's Office and the public information officer. She was also a former deputy director of the Department of Community and Culture.

Deliberation

Mr. Rowley made a motion that the personnel evaluations were properly classified. They included documents 43 through 47 and 50 through 57. Mr. Hemphill seconded the motion. A vote was taken. Mr. Daniels, Mr. Hemphill, Ms. Ross, Mr. Rowley, and Mr. Whittaker voted in favor of the motion. The motion passed unanimously. Mr. Hemphill made a motion that the Committee go in camera. Mr. Whittaker seconded the motion. A vote was taken. Mr. Daniels, Mr. Hemphill, Ms. Ross, Mr. Rowley, and Mr. Whittaker voted in favor of the motion. The Committee went in camera.

Closed session -- 10:30 a.m. Open session -- 12:03 p.m.

Deliberation

Mr. Whittaker made a motion to return to open session. Mr. Rowley seconded the motion. A vote was taken. Mr. Daniels, Mr. Hemphill, Ms. Ross, Mr. Rowley and Mr. Whittaker voted in favor of the motion. The Committee returned to open session. Ms. Fayhs joined Mr. Harrie at the petitioner's table. Mr. Whittaker made a motion that document number 36, an internal audit, was improperly classified, was not an ongoing audit, and should be released. Mr. Daniels seconded the motion. A vote was taken. Mr. Daniels, Mr. Hemphill, Ms. Ross, Mr. Whittaker voted in favor of the motion. Mr. Rowley voted against the motion. The motion passed. Mr. Hemphill made a motion that the following documents were properly classified under UCA 63G-2-305(16), (17) and or (18): 4, 32, 33, 37, 38, and 40. Further, that the following documents were improperly classified and should be released: 3, 7, 15, 16, 19, 20,

and 71. Mr. Whittaker seconded the motion. A vote was taken. Mr. Daniels, Mr. Hemphill, Ms. Ross, Mr. Rowley and Mr. Whittaker voted in favor of the motion. The motion passed. Mr. Hemphill made a motion that the following documents were properly classified under UCA 63G-2-103(22)(b)(ii) or protected under UCA 63G-2-305(22): 8, 10, 14, 21, 22, 28, 34, 35, 41, 42, 48, 58, 59, 60, 61, 62, 63, 64, 66, 68, 69, and 70, Further, the following documents were improperly classified as protected under UCA 63G-2-103(22)(b)(ii) and or UCA 63G-2-305(22) and should be released as public: 5, 6, 9, 11, 12, 13, 17, 18, 23, 24, 25, 26, 27, 29, 30, 31, 39, 49, 52, 65, and 67. Mr. Daniels seconded the motion. A vote was taken. Mr. Daniels, Mr. Hemphill, Ms. Ross, Mr. Rowley and Mr. Whittaker voted in favor of the motion. The motion passed. Ms. Ross thanked the parties for their attendance. Ms. Kinsman asked that the order specify why some documents were not protected under attorney client privilege and why some were not deemed drafts. Mr. Tonks said the order would reflect the reason for the decisions as clearly as possible without revealing the content of the documents. Ms. Ross said an order would be sent within five business days. Mr. Harrie asked if release in the public interest had been considered. Ms. Ross said it had, but had not been seen by a majority of the Committee to apply.

Cases in District Court

Mr. Tonks discussed the cases in District Court. See the attached document for an update.

Decisions and Orders -discussion item

Ms. Ross said the five-day limit to produce an order had been difficult to achieve. She said she had discussed with Senator Curtis Bramble the potential for adding two days to the time frame. She had called Jeff Hunt. He said that five days had been sufficient for twenty years. Ms. Smith-Mansfield said that five years ago the time was changed from three to five days. The reason for a need to change was not clear to Mr. Hunt. Ms. Ross was concerned that the Committee members had sufficient time to review the orders. An order should be received by Committee members by day four, not day five. Ms. Ross asked the Attorney General's Office to provide the order by day four. The item was not an action item, but Ms. Ross said she may ask Senator Bramble to include the provision in the bill pending See attached draft of possible revision.

Calendar

Ms. Ross asked Ms. Mumford the date of the next meeting in March. The meeting had been calendared for the second Thursday, March 8, 2012, the last day of the legislative session. Ms. Ross and Ms. Smith-Mansfield would not be available for a meeting that day. Mr. Hemphill would act as Chair pro tem.

Confirmation of the Executive Secretary

Mr. Rowley made a motion that Susan Mumford be retained as Executive Secretary of the State Records Committee. Mr. Hemphill seconded the motion. A vote was taken. Mr. Daniels, Mr. Hemphill, Mr. Misner, Ms. Ross, Mr. Rowley, Ms. Smith-Mansfield and Mr. Whittaker voted in favor of the motion. The motion passed unanimously.

Minutes of January 12, 2012

Mr. Hemphill made corrections to the January SRC minutes. With the corrections, he made a motion to approve the minutes. Ms. Smith-Mansfield seconded the motion. A vote was taken. Mr. Daniels, Mr. Hemphill, Mr. Misner, Ms. Ross, Mr. Rowley, Ms. Smith-Mansfield and Mr. Whittaker voted in favor of the motion. The motion passed unanimously. The minutes were approved as revised.

SRC Appeals received.

Ms. Mumford reviewed the appeals received by the State Records Committee. See the attached list. Two hearings were scheduled for March.

Rule for provision of a log

The Committee discussed a draft of a rule for the respondent to provide a log for denied records. The wording was revised. See attached draft with revisions. Mr. Daniels made a motion to approve the final wording of the rule. Mr. Hemphill seconded the motion. A vote was taken. Mr. Daniels, Mr. Hemphill, Mr. Misner, Ms. Ross, Mr. Rowley, Ms. Smith-Mansfield and Mr. Whittaker voted in favor of the motion. The motion passed unanimously.

Enforcement of settlement agreements

Ms. Ross presented a draft of a rule or a statute change to respond to an entity which does not comply with an order or a settlement agreement. The Committee members discussed options and the status in law of a pre-hearing conference. See attached draft. Action on the issue was postponed.

Calendar reconsideration

Mr. Hemphill proposed choosing a date for the March SRC meeting when more members of the Committee would be able to attend. Mr. Daniels said that the second Thursday of June was Flag Day. He would not be able to attend a meeting that day. Friday, March 9, 2012 was selected as the next meeting day for the Committee. Friday, June 15, 2012, was chosen as the day for the SRC meeting for June.

Adjournment - 1:30 p.m.

The meeting was adjourned by acclamation.

STATE RECORDS COMMITTEE

February 15, 2012

State Archives Building, Courtyard Meeting Room 346 S. Rio Grande (450 West) Salt Lake City

AGENDA Call to Order 9:30 a.m.

Hearings

- 1. Wesley Thompson vs. Utah Department of Corrections.
- 2. Judy Fahys, Tribune vs. Department of Community & Culture.

BUSINESS

- 1. Calendar meetings for 2012
- **2.** Confirmation of Executive Secretary for year beginning January 2012, action item
- 3. Approval of January 12, 2012 SRC Minutes, action item
- 4. Rule for enforcement of settlement agreements, action item
- 5. Rule for log of denied records, action item
- 6. Decisions and Orders, discussion item
- 7. SRC appeals received
- 8. Cases in District Court
- 9. Other Business

ADJOURNMENT

Next meeting scheduled for March 8, 2012, at 9:30 a.m.

Susan Mumford - SB 177 Amendment

From:

Betsy Ross

To:

Curtis Bramble

Date:

2/16/2012 1:12 PM

Subject:

SB 177 Amendment

CC:

Doug Misner; Ernest Rowley; Lex Hemphill; Patricia Smith-Mansfield; ...

Attachments: SB 177 2012 amendment.docx

Senator Bramble,

The State Records Committee (SRC) met yesterday and discussed the attached amendment. While the SRC did not take any action (as the item was calendered as "discussion" not "action"), we discussed the concern that the current five business days for issuing an order is insufficient. The current process in which the Attorney General's Office drafts the initial order, and each member of the seven-member committee may provide comment, has proven difficult to conclude in five business days given the dedication of committee members to producing orders that will provide guidance to future petitioners and government entities.

I have proposed this amendment to Jeff Hunt, but he and I have not had the chance to actually discuss the amendment. I will continue to seek that conversation with him.

In the meantime, I will try to visit the Senate this afternoon during floor time and will send a note in to discuss this item with you, or to arrange a time for a discussion.

Thank you,

Betsy Ross

Chair, SRC

Lines 1308-1310:

(11)(a) No later than [five] <u>seven</u> business days after the hearing, the records committee shall issue a signed order either granting the petition in whole or in part or upholding the determination of the governmental entity in whole or in part.

TO: State Records Committee FROM: Betsy Ross, Chair

RE: Enforcement of Pre-Hearing Settlements

DATE: October 31, 2011

QUESTION

What are the Committee's options when there is a prehearing conference that results in a settlement that is later violated by one of the parties to the settlement?

DISCUSSION

GRAMA does not address a prehearing process or settlement. The prehearing process is only addressed in Rule, as follows:

R35-3-1. Authority and Purpose.

In accordance with the general objectives of the Government Records Access and Management Act in facilitating access to records, and in keeping with the objectives of hearing procedures found in Section 63G-2-403, Utah Code, to resolve disputes, this rule authorizes and establishes the procedure for holding prehearing conferences.

R35-3-2. Scheduling Prehearing Conferences.

- (a) In the process of planning and organizing efforts to execute appeals which are filed pursuant to Section 63G-2-403, the chair of the state records committee, at his or her discretion, may direct the disputing parties to appear before him or her, in person or telephonically, for a prehearing conference, to be held before any official appeals hearing, for such purposes as:
 - (1) Encouraging exploration of areas of agreement, including stipulations; or
 - (2) Facilitating settlement of the appeal.
- (b) In the event that the issue, or issues scheduled for an appeals hearing are resolved at a prehearing conference, the committee chair shall report the settlement to the entire records committee at the next scheduled meeting for the purposes of creating a public record. Any stipulations shall be written and presented to the members of the records committee at the hearing.

There is no provision in Rule (or in GRAMA itself) for imposing a consequence when one of the parties to the settlement violates a term of the settlement. There is also no provision in rule (or in GRAMA itself) that would allow reinstatement of the original appeal upon a failed settlement if more than 52 days since the date the notice of appeal was filed has passed (see 403(4)(a)(i). (The provision requiring an appeal be filed within 30 days after the government entity has denied the records request would also have passed, thus preventing the filing of a new appeal.) The problem that results is that there is neither penalty nor avenue for appeal, creating an incentive to agree to settle, then stall long enough that the time frame for scheduling a hearing has passed.

OPTIONS

- 1. It might be necessary to statutorily address settlement agreements and their enforcement with language similar to the following (under 63G-2-403):
- (15)(a) The chair of the records committee may schedule a prehearing conference to encourage the parties to explore areas of agreement and disagreement, or to facilitate settlement of the appeal.
- (b) If the parties agree to a settlement, the terms of the settlement shall be reduced to writing by the governmental entity within 5 business days of the prehearing and provided to the executive secretary at that time for distribution to the committee.
- (c) The terms of a settlement agreement shall provide a time frame within which the parties to the settlement will perform the duties as designated in the settlement.
- (d) If a party to the settlement does not perform its designated duties within the time frame set forth in the settlement, the aggrieved party may request a reinstatement of the original appeal for hearing before the records committee.
- (e) At the subsequent hearing, the records committee may consider the reasons for the noncompliance and impose a civil penalty of up to \$500 for each day of noncompliance beyond the agreed-upon time frame in the settlement, if the committee find the noncompliance to be in bad faith.
 - 2. Or it may be possible to address enforcement by Rule, adding to the current Rule (R35-3-2) as follows:
 - (c) In the event one of the parties to the settlement does not comply with the terms of the settlement, the original appeal may be reinstated at the request of the aggrieved party and a hearing scheduled for the next meeting of the records committee.
 - 3. Other options?

We will be discussing this topic at our November State Records Committee meeting.

Betsy

Committee approved draft of rule

If, prior to the hearing, the committee chair deems that the disputed records are such that it may be difficult for the committee to review the records during a hearing, in accordance with the provisions of UCA 63G-2-403, he or she has the discretion to require the governmental entity to provide to the committee, along with their written statement, pursuant to UCA 63G-2-403(5), a log that will provide:

- a. A description of the record or portions of the records to which access was denied
- b. Citations to the provisions of GRAMA concerning the classification of the records.

SRC Appeals Received February, 2012

- 1. Edward Owens vs. State Crime Laboratory. Mr. Owens appealed the denial of a copy of a report with a case number and all lab notes and pictures of items submitted for testing. He also requested a fee waiver based on impecuniosity. The appeal was incomplete. I wrote a letter explaining the process of appeal and enclosed a copy of the section of the law, sections 63G-2-204-205, and 63G-2-403.
- 2. Rodney Ham vs. Human Services. Mr. Ham requested records that had been lost. He was denied based on UC63G-2-201(7)(iv): "a governmental entity is not required to fulfill a duplicative request..." The original request was in 2003. A hearing can be scheduled when the appeal is complete. I wrote a letter explaining the process of completing the appeal to the SRC.
- 3. Eric Peterson vs. Corrections. Mr. Peterson requested disciplinary reports for a Corrections employee. He requested the report originally in November, and was told an investigation was ongoing. Another request sent in January was denied, appealed and denied. A hearing will be scheduled for March.
- 4. Lani Ete vs. Human Services. Ms. Ete requested copies of records of her phone calls and letters to DCFS requesting that information be amended in the files of her grandchildren. After conferring with two members of the Committee, a hearing was denied based on 63g-2-302, UC 63G-2-202(1)(a-d). This denial based on decision 10-16, Shawn and Barbara Lewis vs. Department of Human Services. The records were properly classified based on 62A-4a-412(1)(e): Human Services records can be made available to "subject of the report, the natural parents of the child, and the guardian ad litem."
- 5. Yolanda Willars vs. Utah State Tax Commission. Ms. Willars, represented by Fontenot Law, requested the report and documents related to her detention and citation in the Murray Justice Court. Officers in plain clothing apparently from the Utah Motor Vehicle Enforcement Division (MVED) of the Utah State Tax Commission arrested her. Hearing is scheduled for Thursday, March 8, 2012.
- 6. Gordon Thomas vs. Public Safety. Mr. Thomas requested copies of his complete criminal history from BCl. He filled out the application but said he is indigent. He can't afford the required \$15.00 fee or provide required fingerprints.
- 7. Scott Lewis vs. Human Services. Incomplete appeal for DCFS records.

February 2012 Records Committee Case Updates

District Court Cases

Attorney General Office. v. Schroeder, 3rd District, Salt Lake County, Case No. 110917733, Judge Hansen, filed Sept. 21, 2011; Case No. 110917703, Judge Medley, filed Sept. 20, 2011.

Current Disposition: Answers filed on behalf of Committee in both cases. Motion to consolidate two cases filed by Attorney General Office on Oct. 14, 2011. Motion to consolidate granted on January 3, 2012.

Nakamura v. Salt Lake City, 3rd Judicial District, Salt Lake County, Case No. 100917589, Judge Medley. Filed September 17, 2010.

Current Disposition: Case dismissed at show cause hearing held on January 26, 2012.

Attorney General Office v. Peterson, 3rd Judicial District, Salt Lake County, Case No. 100911772, Judge Reese. Filed July 1, 2010.

Current Disposition: Both parties' motions for summary judgment hearing argued on November 30, 2011. Court issued a decision on the motions for summary judgment on January 11, 2012 granting each motion in part. A sealed order detailing what records should be released was also issued but has not been received by the Committee at this time. No appeal has been filed yet.

Salt Lake City v. Jordan River Restoration Network, 3rd Judicial District, Salt Lake County, Case No. 100910873, Judge Shaughnessy. Filed June 18, 2010.

Current Disposition: The Court had an in court status/scheduling conference on August 11, 2011. The Court requested that the parties conclude discovery and submit their motions for summary judgment for consideration by the Court.

Maxfield v. Lieutenant Governor, 3rd Judicial District, Salt Lake County, Case No. 100907599, Judge Shaughnessy. Filed April 28, 2010.

Current Disposition: Hearing held on June 13, 2011 for Lieutenant Governor's partial motion for summary judgment. Court granted the motion finding that the "manner of setting and amount of the fee, being neither a records access determination nor a claim concerning an unreasonable denial of a fee waiver, is not within the power and authority of this Court under GRAMA."